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No. 93-995

In The

Supreme Court of the United States

October Term, 1993

HOME BUYERS WARRANTY CORPORATION II, and NATIONAL HOME INSURANCE COMPANY,

Petitioners,

v.

JULIETTE G. LOPEZ,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Alabama Supreme Court's re-interpretation of "involving commerce," for purposes of Section 2 of the Federal Arbitration Act, to apply only to transactions where the parties subjectively "contemplated substantial interstate activity" – a restrictive reading avowedly adopted in order to promote the state's own anti-arbitration policy – is inconsistent with the intent of Congress as interpreted by this Court and the federal Courts of Appeals.

2. Whether "involving commerce" in Section 2 of the Federal Arbitration Act should be interpreted to exploit the full reach of the Commerce Clause, rather than be given the restrictive scope specially created for the federal Act by the Alabama Supreme Court.

3. Whether the Alabama Supreme Court's restrictive re-interpretation of Section 2 wrongly makes the Federal Arbitration Act inapplicable to a wide variety of transactions intended to be covered, thereby threatening to marginalize the important body of federal substantive and procedural FAA law developed by this Court over the past several decades – by shrinking the number and kind of cases to which it would apply.

LIST OF PARTIES

Two parties involved at earlier stages of this litigation are not named as parties in this petition. Aronov Realty Company and Jack Deal, although defendants in the original action, did not participate in the appeal to the Alabama Supreme Court, whose decision is sought to be reviewed.

Parent companies:

Home Buyers Warranty Corporation II ("HBW") is a wholly owned subsidiary of Builders Structural Services Incorporated II ("BSSI II").

National Home Insurance Company (A Risk Retention Group) ("NHIC") is owned by its approximately 12,000 member-owner-homebuilders. One of them, Holden Construction Management, Inc., a wholly owned subsidiary of BSSI II, owns all the Class B common shares, which constitute 95 per cent of the common share equity of NHIC. The Class A common shares, constituting 5 per cent of the common share equity, are owned by the other member-owner-homebuilders.

Subsidiaries:

Neither HBW nor NHIC has any subsidiaries.

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On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

PETITION FOR A WRIT OF CERTIORARI

Home Buyers Warranty Corporation II ("HBW") and National Home Insurance Company ("NHIC") respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Alabama in this case.

OPINIONS BELOW

The opinion of the Alabama Supreme Court, not yet reported, is reproduced in the Appendix at App. 1-10. The opinion of the Circuit Court of Montgomery County,

Alabama, likewise not reported, is reproduced in the Appendix at App. 11-15.

JURISDICTION

The opinion of the Alabama Supreme Court was released on August 20, 1993. (App. 1-10) Petitioners' timely application for rehearing was overruled on September 24, 1993. (App. 16) This Court has jurisdiction to consider this petition under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The federal constitutional provisions involved are the Commerce Clause of Article I, Section 8, and the Supremacy Clause of Article VI. The statutory provisions involved are Sections 1 and 2 of the Federal Arbitration Act, 9 U.S.C. Sections 1 and 2, and Section 8-1-41(3) of the *Code of Alabama 1975*, as amended. These provisions are reproduced in the Appendix, at App. 17-18.

STATEMENT OF THE CASE

In 1988, petitioner HBW, a Colorado corporation, from its service office in Denver, issued a home buyers warranty covering specified potential defects on a new house in Montgomery, Alabama. The warranty agreement provided that HBW's representative would inspect the house, and that any claims under the warranty be filed either in Denver, or at the Colorado company's regional

office in Tucker, Georgia. HBW maintains no office or personnel in Alabama.

In August of 1989 the Montgomery house was resold to respondent and her husband, who at the time were in Key West, Florida. Closing documents shuttled back and forth between Key West and Montgomery by fax and private courier. The new buyers executed the closing documents in Key West, assisted by their lawyer, who was also in Key West. The warranty transferred to the new owner.[1]

Shortly after respondent moved into the Montgomery house, she asserts she observed structural defects. She notified HBW's regional office in Tucker, Georgia. The Denver service office replied, sending respondent the necessary claims forms and other information. Despite a clause in the warranty agreement requiring arbitration, in April 1991 respondent sued HBW on the agreement in Montgomery County circuit court. HBW moved to enforce the agreement's arbitration clause. Although Alabama law prohibits specific enforcement of predispute arbitration agreements, the circuit court found sufficient involvement of interstate commerce under Section 2 of the Federal Arbitration Act (the "FAA"), 9 U.S.C. Section

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[1] The warranty is that of the builder. Petitioner HBW is a warranty administration company which performs warranty-related tasks for builder members of petitioner NHIC, and for NHIC. NHIC is a Colorado corporation licensed and regulated by the Colorado Division of Insurance. It is a risk retention group organized and operating pursuant to the Federal Risk Retention Act, 15 U.S.C. Sections 3901 *et seq.* NHIC insures its member-owners' new home warranties in the 48 contiguous states. The builder here was a member-owner of NHIC.

2, to invoke the federal provision requiring enforcement. (App. 13-15). On October 19, 1992, the court stayed suit pending arbitration.

The Alabama Supreme Court granted a writ of mandamus on August 20, 1993, vacating the circuit court's order. A majority held the FAA inapplicable, for insufficient involvement of interstate commerce.[2] The majority reached this result because a few weeks earlier, on July 16, 1993, it had dramatically re-interpreted the way Section 2 of the FAA applies in Alabama.

Until this past summer, contradictory tests for determining the sufficiency of "commerce" for FAA purposes had co-existed in Alabama jurisprudence. Under *Ex parte Costa & Head (Atrium), Ltd.*, 486 So. 2d 1272 (Ala. 1986) (*"Costa & Head"*), the FAA was generally interpreted to apply when there was the "slightest nexus" with interstate commerce – reflecting the court's then view that the FAA was intended to exploit the full reach of the Commerce Clause. On the other hand, in two narrow categories of cases – those involving consumer disputes with automobile dealers and disputes arising out of stock purchase agreements – the court had since 1989 applied a more restrictive test. That was the test formulated in *Ex parte Warren*, 548 So. 2d 157 (Ala.), *cert. denied sub nom Jim*

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[2] *Lopez v. Home Buyers Warranty Corp. II*, 1993 Ala. LEXIS 818, ___ So. 2d ___ (August 20, 1993), reproduced at App. 1-10. Of the nine sitting justices, one – Justice Ingram – concurred in the result, while two – Justices Maddox and Adams – dissented. Both sides raised and briefed the federal issue of the applicability of the FAA and how "involving commerce" should be interpreted. That issue was decided by the court, and its resolution objected to by the dissenting justices. (App. 3-10)

Skinner Ford, Inc. v. Warren, 493 U.S. 998 (1989) ("*Warren*"), holding that the FAA applied only where the contracting parties were shown at the time of agreement to have subjectively "contemplated substantial interstate activity."[3]

On July 16, 1993, over the objections of Justices Maddox, Adams and Ingram, the Alabama Supreme Court formally overruled *Costa & Head* in favor of *Warren*. The new, more restrictive re-interpretation was announced in two cases decided that day: *Ex parte Jones*, 1993 WL 262036 (Ala.), ___ So. 2d ___ (July 16, 1993); and *Continental Grain Co. v. Beasley*, Ala. LEXIS 669, ___ So. 2d ___ (July 16, 1993).[4] The majority opinion in the present case candidly admitted that *Warren*'s "contemplation" test had been chosen because it "better promotes our strong public policy against the use of predispute arbitration agreements." (App. 4) For the Court's convenience, we have

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[3] By its own terms, and as described in later cases, until mid-1993 *Warren* was originally confined to its own "narrow factual context." *Ex parte Brice Building Co.*, 607 So. 2d 132 (Ala. 1992). Indeed, the majority in *Ex parte Jones*,1993 WL 262036, ___ So. 2d ___ (July 16, 1993), admitted that it had "reemphasized" in prior cases that "Warren 'has a narrow application.' " And Justice Maddox observed in his *Ex parte Jones* dissent that *Warren* had in practice only been applied to consumer disputes with auto dealers, and to disputes arising out of stock purchase agreements.

[4] In *Ex parte Jones*, a dispute arising out of a stock purchase agreement, the majority denied arbitration. In *Continental Grain*, involving agreements between a foreign corporation and its Georgia division using Alabama chicken growers to raise poultry for interstate markets, the court found the federal Act applicable even under the new test.

reproduced the text of *Ex parte Jones* in the Appendix, starting at App. 19.

A few weeks later, the court applied this more restrictive test to deny arbitration to petitioner. Justices Maddox and Adams again dissented.[5] Justice Maddox argued that the court's new subjective "contemplation" test was inconsistent with the FAA's legislative history, and with this Court's decisions in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), and *Perry v. Thomas*, 482 U.S. 483 (1987). (App. 7-10)

The present case was only one of four separate cases in which the Alabama Supreme Court, this past August, used the new "contemplation" test to deny specific enforcement of predispute arbitration agreements.[6] A

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[5] Justice Ingram concurred in the result.

[6] The other three were *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 1993 Ala. LEXIS 800 (August 13, 1993), where the homeowner deliberately replaced his local termite bond to "go with a national company like Terminix," used a Veterans Administration form, and obtained a bond issued in Tennessee by an Arkansas corporation and guaranteed by a Delaware limited partnership based in Tennessee; *The Terminix Int. Co. LP v. Jackson*, 1993 Ala. LEXIS 803 (August 13, 1993), involving a Delaware limited partnership based in Tennessee, and a termite bond issued by an Arkansas company utilizing a Veterans Administration form and contemplating use of materials brought in from out-of-state; and *Henderson v. Superior Ins. Co.*, 1993 Ala. LEXIS 812 (August 20, 1993), involving claims under an accident insurance policy issued in Atlanta, Georgia, by a Delaware corporation based in Atlanta with no Alabama office.

Neither of the *Lopez* dissenters sat in any of these three cases.

timely petition for rehearing in the present case was denied on September 24, 1993.

REASONS FOR GRANTING THE WRIT

Section 2 of the FAA declares that written agreements to arbitrate

> in any maritime transaction or a contract evidencing a transaction *involving commerce* . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. [Emphasis supplied]

This statute, reflecting a strong national policy favoring arbitration, was intended to "revers[e] centuries of judicial hostility to arbitration agreements." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974). This Court zealously enforces the statute, "notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Since *Prima Paint Corp. v. Flood & Conklin Mfg. Corp.*, 388 U.S. 395 (1967), this Court has eliminated one state-created barrier after another to implementation of the FAA's pro-arbitration policy, and has created a body of federal substantive and procedural law controlling in both federal and state courts – applicable in those cases where the FAA itself applies through Section 2. In the course of developing this body of law, the Court has recognized that Congress intended the FAA to apply "within the full reach of the Commerce Clause." *Perry v. Thomas*, 482 U.S. 483, 490 (1987).

Alabama maintains a contrary state public policy hostile to arbitration. By statute it strictly prohibits enforcement of predispute arbitration agreements, except where federal law preempts.[7] The Alabama Supreme Court has now created a device to widen the scope of Alabama's anti-arbitration policy at the expense of the federal policy strongly favoring arbitration. The device is as simple as it is impermissible. Attack the federal policy at its weakest link – that is, cut back the reach of the FAA, and therefore the federal substantive and procedural law inextricably linked to it, by shrinking the meaning of the key jurisdictional phrase "involving commerce." Once the jurisdictional reach of the FAA is shrunk, the body of federal substantive and procedural law developed by this Court in connection with the FAA would only apply to the shrunken number of cases that can satisfy this narrower, and highly subjective, jurisdictional test.

In Alabama, "involving commerce" no longer means that the FAA applies to any transaction with the "slightest nexus" to interstate commerce, or even to transactions "affecting" commerce. Instead, in Alabama, the FAA now only applies – and predispute arbitration clauses are only specifically enforceable and the related federal law applicable – where the contracting parties are found to have subjectively "contemplated substantial interstate activity"

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[7] *Code of Alabama, 1975,* Article 8-1-41 includes among "obligations [which] cannot be specifically enforced: . . .

(3) An agreement to submit a controversy to arbitration."

when they agreed to arbitrate. The key in many cases will be personal affidavits from parties seeking to avoid arbitration, or to avoid some aspect of the body of federal law that accompanies the FAA, that they "had not contemplated substantial interstate activity" when they voluntarily entered into contracts containing agreements to arbitrate.[8]

The decision of the Alabama Supreme Court conflicts with decisions by this Court and by several of the federal Courts of Appeals. Should the Alabama decision stand, the important federal policy strongly favoring arbitration would have only a stunted application in Alabama and in other states which do not enforce predispute arbitration agreements. Moreover, courts bent on preserving anomalous state limitations upon arbitration would be tempted to use the subjective "contemplation" test in order to limit the scope both of the FAA itself and of the federal substantive and procedural law linked to it.

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[8] Justice Maddox' *Ex parte Jones* dissent (App. 25) noted that commentators in Alabama had criticized the *Warren* test for its "subjectivity," citing Bynam & Pugh, "Enforcing Arbitration Agreements in Alabama: A Double Dilemma," 54 *Alabama Lawyer* 38, 43 (January 1993). The authors wrote: "The *Warren* subjective test encourages the party seeking to avoid arbitration to fabricate, after the fact, his alleged 'state of mind' at the time of contracting to avoid the enforcement of an unambiguous written clause."

I. The Alabama Supreme Court's re-interpretation impermissibly restricts the FAA, and therefore the federal substantive and procedural law linked to it, to transactions where the parties subjectively "contemplated substantial interstate activity" – contrary to the intent of Congress as interpreted by this Court

Southland Corp. v. Keating, 465 U.S., at 16, recognizes that, in creating the FAA, "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." There, the Court confronted a California ban on arbitration of claims brought in state court under a state franchise investment law, on the theory that the FAA did nothing more than create a procedural remedy for cases brought in federal court. This Court gave that position short shrift. In language pertinent here, the Court held that in enacting the FAA:

> Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.

465 U.S., at 14.

In *Perry v. Thomas*, 482 U.S. 483 (1987), the Court held that the FAA preempted provisions of the California Labor Code purporting to exempt wage claims from arbitration. In its decision, Section 2 of the FAA was described, 482 U.S., at 490, as

> a statute that embodies Congress' intent to provide for the enforcement of arbitration agreements *within the full reach of the Commerce Clause.* [Emphasis supplied][9]

As demonstrated by the dissenting opinions in such cases as *Southland, Mercury Construction, Perry* and *Prima Paint,* the FAA's legislative history left room for honest disagreement about aspects of the original intent. These have included whether the FAA applies to state, as well as federal, court proceedings; whether important substantive areas regulated by various federal statutes are beyond the reach of the FAA; whether states may carve out substantive areas for exclusion from the FAA; and whether the states may interpose procedural obstacles of their own invention, such as court determination of "fraud in the inducement" defenses. But *Prima Paint* and subsequent cases have settled such disagreements.

Nor should it any longer be open to question that, as this Court held in *Perry,* Section 2 was intended fully to exploit the reach of the Commerce Clause. If *Perry* is correct, enforceability under the FAA, and application of the federal substantive and procedural law linked to it, cannot be restricted to those arbitration agreements

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[9] This broad interpretation of Section 2 was not casually uttered. To reach its result, the Court had to distinguish its earlier decision in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware,* 414 U.S. 117 (1973). *Ware* had held that the same California Code provisions did not conflict with the federal securities regulatory scheme and were not preempted. The Court distinguished *Ware* on the ground that, unlike the FAA, the federal scheme involved there did not require "nationwide uniformity" of dispute resolution, manifested no intent to require arbitration, and had a narrower jurisdictional base.

where the contracting parties are found to have subjectively "contemplated substantial interstate activity."

The Alabama Supreme Court's decision to the contrary was not based on any examination of the legislative history, or even on analysis of this Court's decisions. Instead, the majority simply chose *Warren's* more restrictive "contemplation" test, which the court had itself always confined to its "narrow factual context," over the more expansive "slightest nexus" test of *Costa & Head*. And it did so precisely because it believes the more restrictive test better accommodates Alabama's public policy against specific enforcement of predispute arbitration agreements.

In *Warren*, too, the majority had omitted to review either the legislative history or this Court's decisions. Instead, it had lifted language – out of context – from dictum in a concurring opinion in *Metro Industrial Painting Corp. v. Terminal Constr. Co.*, 287 F.2d 382 (2d Cir. 1961). *Metro* was an exceedingly easy case, whatever the jurisdictional standard, for it arose out of an agreement made in New York between Connecticut and New Jersey contractors and a New York subcontractor under which the New York sub performed painting services at Homestead Air Force Base in Florida, using out-of-state personnel and materials. Judge Lumbard's concurring opinion addressed the "involving commerce" question, not for the purpose of restricting the reach of the FAA, but to suggest that what mattered was not whether people or goods actually crossed state lines (parties opposing arbitration

had argued that all the painting work was in fact performed in one Florida county), but whether the agreement on its face "evidences interstate traffic." 287 F.2d, at 387.[10]

North Carolina's Supreme Court, which sometimes relies on Judge Lumbard's "contemplation" language, does so not to further an anti-arbitration policy, but to *broaden* the reach of the FAA and rebut arguments that it does not apply, e.g., where contractual performance was exclusively in-state. See *Burke County Public Schools Bd of Ed v. Shaver Partnership*, 303 N.C. 408, 279 S.E.2d 816, 818-19 and n.8 (1981), where a lower court had perversely read *Prima Paint* to require "actual physical interstate shipment of goods." The state supreme court cited *Metro* as one of several cases applying the FAA despite the fact that the contracted-for performance was entirely local.[11]

In short, the Alabama Court has stood *Metro* on its head, using dictum in a concurring opinion in an easy case – language intended to repel an attack on the FAA –

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[10] Indeed, Judge Lumbard observed the arbitration agreement in *Metro* was, in any event, enforceable under New York state law, as well as under the FAA. 287 F.2d, at 388 n.3.

[11] *Burke County* involved a repealed, but arguably still applicable North Carolina statute interpreted, despite ostensibly favorable language, to forbid specific enforcement of predispute arbitration agreements. A new statute, effective August 1, 1973, made such agreements specifically enforceable. 279 S.E.2d, at 818 n.5.

See also, Bennish v. North Carolina Dance Theater, Inc., 108 N.C. App. 42, 422 S.E.2d 335 (N.C. Ct. of App. 1992), where the court emphasized North Carolina's present pro-arbitration policy, and cited the Lumbard language to make clear that the FAA applies to personal service contracts.

as a device to broaden the reach of Alabama's own anti-arbitration policy at the expense of the FAA and the federal body of law linked to it.

II. The Alabama Supreme Court's re-interpretation of Section 2 conflicts with decisions of the federal Courts of Appeals

The Alabama Supreme Court's decision that "involving commerce" requires that the parties subjectively "contemplated substantial interstate activity" conflicts with decisions by several of the federal Courts of Appeals.

The leading case is *Snyder v. Smith*, 736 F.2d 409, 417-18 (7th Cir. 1984), *cert. denied*, 469 U.S. 1037 (1985). *Snyder* involved a partnership whose sole function was to own real property in Harris County, Texas, but whose partners all lived in Illinois when the partnership was formed. At issue was a dispute over the price to be paid for a deceased partner's interest. Appellant unsuccessfully argued that it was not enough to show that the transaction "affected commerce," and disputed the sufficiency of "any casual and sporadic activities in which the partnership engaged." On these facts, the appellate court found the FAA applicable. It noted that *Prima Paint* had declined to limit the FAA to interstate shipment of goods, as the losing party there had argued. And it construed *Southland's* statement that "involving commerce" was not a limitation on the statute but a "qualification" as "suggest[ing] that Congress intended the [FAA] to apply to all

contracts that it constitutionally could regulate." 736 F.2d, at 418.[12]

In the Fifth Circuit, the FAA applies to all contracts "relating to interstate commerce." The Court of Appeals so held in *Mesa Operating Limited Partnership v. Louisiana Intrastate Gas Corp.*, 797 F.2d 238, 243-44 (5th Cir. 1986), citing the legislative history, *Prima Paint*, and *Snyder*. At issue was a take-or-pay contract over royalty gas owned by the State of Louisiana, produced in Louisiana by Mesa, and transported and sold to customers entirely in Louisiana. It was sufficient to invoke the FAA that Mesa partners lived in Texas, and sometimes traveled to and otherwise communicated with Louisiana. In *Del E. Webb Constr. v. Richardson Hosp. Authority*, 823 F.2d 145, 147-48 (5th Cir. 1987), the Court of Appeals not only followed *Mesa*, but expressly rejected an argument that for FAA purposes the interstate commerce must be "substantial." *Webb* arose out of a construction dispute where all the construction was in Texas, Webb maintained an office in Texas to run the project, and issued all payroll checks in Texas. The court found it sufficient that employees and construction materials crossed state lines, and that the mails were used.

The Alabama Supreme Court decision also conflicts with the Tenth Circuit's decision in *Foster v. Turley*, 808 F.2d 38, 40-41 (10th Cir. 1986), arising out of an agreement to purchase half of a New Mexico mine. The buyer Foster lived in Oregon, on at least one occasion sent trucks to

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[12] Back in 1986, when the Alabama Supreme Court fashioned its own "slightest nexus" test, it relied explicitly on *Snyder*. *Costa & Head*, 486 So. 2d, at 1275.

New Mexico, proceeds were sent to him in Oregon, and the mine's products were sometimes milled and sold outside of New Mexico. The court had no difficulty on these facts. And it, too, held that "involving commerce" is to be construed as "coextensive with congressional power to regulate under the Commerce Clause," in reliance on *Prima Paint* and *Snyder*. 808 F.2d, at 40.[13]

III. The Alabama Supreme Court's decision shrinking the FAA's reach in Alabama, and excluding a wide range of transactions intended to be covered, threatens to marginalize the important body of federal substantive and procedural law under the FAA

The decision sought to be reviewed is no fluke. For it represents a deliberate effort to shrink the reach of the FAA, and will inevitably curtail application, in Alabama and many other states, of the body of federal substantive and procedural law which this Court has developed since *Prima Paint*.

In many jurisdictions, the FAA is interpreted to require specific enforcement of predispute arbitration agreements, and therefore compliance with this Court's FAA-related decisions – in all transactions where the fullest reach of the Commerce Clause justifies its application. But in Alabama, the FAA now applies only where

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[13] In a slightly different context, the Sixth Circuit has likewise concluded that Section 2 "was meant to extend the applicability of the Act and its exclusions to the scope of Congress' power under the Commerce Clause . . . " *Willis v. Dean Witter Reynolds*, 948 F.2d 305, 310 (6th Cir. 1991).

the courts find that the contracting parties subjectively "contemplated substantial interstate activity."

Among the immediate consequences of the new test, and we needn't speculate because they are already reflected in a half-dozen Alabama Supreme Court decisions, are these:

1. The FAA, and this Court's FAA-related decisions, no longer apply in Alabama to home buyers warranties issued by out-of-state companies with no local presence – even where the home buyer negotiates to buy his or her new home from outside the state, uses means of interstate commerce to facilitate the purchase, files claims as required in offices outside the state, and receives claims information from out-of-state. *Lopez v. Home Buyers Warranty Corp., supra.*

2. The FAA, and this Court's FAA-related decisions, no longer apply in Alabama to termite bonds issued by out-of-state national companies with no local presence – even where the owner deliberately replaces a local bond with a national one, uses a Veterans Administration form, and has the home inspected by persons traveling from out-of-state and who use out-of-state materials. *Terminix Int. Co. LP v. Jackson, supra,* and *Allied-Bruce Terminix Companies, Inc. v. Dobson, supra.*

3. The FAA, and this Court's FAA-related decisions, no longer apply in Alabama to claims arising out of accident insurance policies issued by out-of-state companies with no local presence, so long as the insured deals with a local agent. *Henderson v. Superior Ins. Co., supra.*

4. The FAA, and this Court's FAA-related decisions, no longer apply in Alabama to claims against dealers selling cars manufactured out-of-state and subject to a whole panoply of federal regulation – even where the parties have agreed in writing "That the motor vehicle described in this sale document has been heretofore traveling in interstate commerce and has an impact upon interstate commerce," so long as the party opposing arbitration asserts, contrary to the written agreement, that "substantial interstate activity" was not "contemplated." *Ex parte Warren*, 548 So.2d, at 158.[14]

Indeed, *Warren* and *Henderson* together suggest the court's intention to limit the FAA only to the most obviously interstate transactions between commercial businesses like the ones in *Continental Grain*, excluding from its reach all transactions between Alabama *consumers*, on the one hand, and local merchants, agents and other businessmen – regardless whether the transactions have a nexus with, or relate to or affect interstate commerce. There is no basis in the legislative history, or this Court's decisions, for such a restrictive view of the FAA.

5. Except in obvious cases like *Continental Grain*, all that it may take in Alabama to avoid the FAA and this Court's FAA-related decisions is a boiler-plate affidavit asserting the *subjective* proposition that the affiant "did not contemplate substantial interstate activity" when voluntarily agreeing to arbitrate future disputes. See, e.g.,

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[14] Justice Maddox, dissenting, wrote that he "cannot make a distinction between a contract to buy stock [held subject to the FAA in prior Alabama decisions] and a contract to buy an automobile." *Ex parte Warren*, 548 So. 2d, at 161.

Henderson v. Superior Ins. Co., supra, where such an affidavit was accorded significant weight.[15]

One by one, this Court has eliminated substantive and procedural obstacles raised by states to the pro-arbitration policy reflected in the FAA. The Court has, for example, rejected contentions that the FAA, and the federal substantive and procedural law linked to it, only apply in federal court, that they have no application in the face of the federal scheme regulating securities or state schemes regulating wage claims, that they don't apply to international antitrust claims or to certain age discrimination claims, that certain kinds of disputes are not really suited to arbitration and are better left to the courts, and that the FAA only applies to transactions involving physical shipment of goods across state lines.

The Court has always recognized the special importance of policing how the FAA is treated in state courts, since the vast bulk of litigation arguably subject to the statute takes place in the state courts. The Alabama Supreme Court's attempt to shrink the reach of the FAA represents, therefore, a serious threat to the objectives which led Congress to enact the FAA and this Court to police its enforcement.

The most immediate victims of this deviant re-interpretation are the parties to the wide range of transactions

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[15] The Alabama decision invites costly and time-consuming peripheral litigation over the truth of such subjective statements, as well as over the "substantiality" of the interstate activity involved. This Court has pointed out that a "core purpose" of the FAA was to avoid such costly delays. *Southland,* 460 U.S., at 7-8

which now seem to be excluded from the FAA in Alabama. These include transactions involving home buyer warranties, termite bonds, accident insurance policies, and the purchase of consumer goods including automobiles so long as local dealers and agents are used.

This more restrictive jurisdictional test is likely to spread not only to states like Mississippi and Nebraska with public policies hostile to arbitration agreements, but also to the many states whose own laws carve out categories of disputes from arbitration, or interpose various procedural hurdles to arbitration. This Court has been vigilant not to permit the FAA to be whittled away by such state-created hazards. But where restrictive and subjective interpretations of "involving commerce" render the FAA inapplicable, these state hazards will come in through the back door.

Once free of FAA compulsion, even those states whose own laws do enforce predispute arbitration agreements will regain the right under state law to carve out exceptions. Courts everywhere will now be free – in cases found to be outside the newly restricted jurisdiction of the FAA – to declare that wage claims, franchise disputes, or state RICO claims are not suitable for arbitration. And they will regain the right to interpose such procedural obstacles as court adjudication of "fraud-in-the inducement" defenses, the right of parties unilaterally to revoke their agreements to arbitrate, extraordinary requirements that arbitration clauses must be signed by the parties' counsel and not by the parties alone, unusual rules for determining when the right to arbitrate has been waived, and special rules governing the remedies allowable through arbitration. These are obstacles to arbitration

which would not, or might not, be tolerated where the FAA does apply.

In short, the Alabama Supreme Court's re-interpretation of "involving commerce" threatens to unravel much of what this Court's FAA decisions have accomplished since *Prima Paint*.

CONCLUSION

The Alabama Supreme Court has deliberately chosen to shrink "involving commerce," in order to promote the state's anti-arbitration policy at the expense of the national policy strongly favoring arbitration. Its restrictive re-interpretation is inconsistent with the intent of Congress, as interpreted by this Court and the federal Courts of Appeals. "Involving commerce" now means one thing in Alabama, something else in the federal Courts of Appeals and many other states. As a result, decades of this Court's FAA-related decisions are threatened to be marginalized even in states whose own laws

enforce predispute arbitration agreements. This is an area where the Court's guidance is urgently needed.

Respectfully submitted,

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December 21, 1993

SUPREME COURT OF ALABAMA

SPECIAL TERM, 1993

1920330

Juliette G. Lopez

v.

Home Buyers Warranty Corporation, et al.

Appeal from Montgomery Circuit Court
(CV-91-897)

SHORES, JUSTICE.

Juliette Lopez filed an "appeal" from an order of the Circuit Court of Montgomery County compelling her to arbitrate her claims against Home Buyers Warranty Corporation II ("Homes Buyers"). The issue here is whether a claim based on a homeowner's warranty is subject to arbitration under the provisions of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-15.

Because "a petition for a writ of mandamus is the proper means to test a trial court's granting of a motion to arbitrate," *Ex parte Alexander*, 558 So.2d 364, 365 (Ala. 1990), we treat Lopez's filing, although it was in the form of an appeal, as a petition for a writ of mandamus requiring the Montgomery Circuit Court to vacate its order compelling arbitration. See *A.G. Edwards & Sons, Inc. v. Clarke*, 558 So.2d 358, 360 (Ala. 1990). We grant the writ.

Mrs. Lopez and her husband purchased a house in Montgomery, Alabama, from Mr. and Mrs. Glen Browder on August 31, 1989. The Browders had listed the house with, and the sale was conducted in part through agents

of, Aronov Realty Company, Inc. ("Aronov"). The Lopezes executed the closing documents on the house while they were in Key West, Florida.[1] The house was covered by a Home Buyers warranty against specified defects. This warranty was issued in 1988 from the Home Buyers office in Denver, Colorado, to the Browders, as the original homeowners. Under the terms of the warranty, a Home Buyers representative was to inspect the house during its construction. The warranty coverage transferred to the Lopezes when they bought the house from the Browders.

Mrs. Lopez moved into the house in June 1990; shortly thereafter, she noticed cracks in the floors and noticed other structural defects. Her attorney notified Home Buyers' regional office in Tucker, Georgia, by letter dated March 1, 1991, of her potential claim under her Home Buyers warranty. A representative from Home Buyers' warranty service office in Denver, Colorado, wrote Mrs. Lopez on March 6, 1991, and informed her of the procedure for filing a claim for coverage of structural damage under her warranty. On April 19, 1991, Mrs. Lopez sued Home Buyers for recovery of the costs of structural repairs to her house. She also sued Aronov, alleging fraud in regard to the sale of the house.

Home Buyers moved to dismiss, or, in the alternative, to compel arbitration under the terms of the arbitration

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[1] The closing documents were sent back and forth between Key West and Montgomery by fax and by private courier. Mr. and Mrs. Lopez closed the purchase on their house with the help of their attorney, who was also in Key West.

clause contained in the warranty. That arbitration clause states, in part:

> "Should the Builder or the Homebuyer(s) disagree with the Insurer's decision to deny the claim as recommended by the Service, the contesting party shall call for conciliation with the Service or an arbitration to be conducted by the American Arbitration Association (A.A.A.), or other mutually agreeable arbitration service at the Service's expense. . . . The voluntary dispute settlement process provided herein shall be a condition precedent to the commencement of any litigation by any party to compel compliance with the warranty documents or to seek relief for any dispute arising out of this program."

On October 19, 1992, the trial court ordered Mrs. Lopez to submit her claims against Home Buyers to arbitration under the terms of the warranty contract. The claims against Aronov have been stayed pending our ruling on the enforceability of the arbitration clause. Although the trial court's order compelling arbitration purported to "dismiss" Mrs. Lopez's claims against Home Buyers, we understand that "dismissal" to be in reality a stay of the proceedings against Home Buyers pending arbitration.

Under Alabama law, the specific enforcement of a predispute arbitration agreement violates public policy unless federal law preempts state law. See § 8-1-41(3), Ala. Code 1975; *Wells v. Mobile County Bd. of Relators, Inc.*, 387 So.2d 140, 144 (Ala. 1980); *Bozeman v. Gilbert*, 1 Ala. 90, 91 (1840). "The FAA applies to a transaction within this state if the contract [1] involves interstate commerce and [2] contains an arbitration clause voluntarily entered

into by the parties." *A.J. Taft Coal Co. v. Randolph*, 602 So.2d 395, 397 (Ala. 1992), citing *Ex parte Alabama Oxygen Co.*, 452 So.2d 860 (Ala. 1984). To determine whether federal law preempts our public policy against enforcement of predispute agreements to arbitrate, we must examine whether the warranty agreement containing the arbitration provision involves interstate commerce. *Ex parte Jones*, [Ms. 1920249, July 16, 1993], ___ So.2d ___ (Ala. 1993).

Home Buyers argues that the warranty agreement involves interstate commerce, and, because this dispute arose out of the warranty agreement, that the FAA must apply. In so arguing, Home Buyers relies on the "slightest nexus" test of *Ex parte Costa & Head (Atrium), Ltd.*, 486 So. 2d 1272 (Ala. 1986), wherein the existence of the slightest nexus between an agreement and interstate commerce would bring the agreement within the ambit of the FAA, thus allowing enforcement of a predispute arbitration provision within the agreement. *Id.* at 1275.

However, we have recently overruled the *Costa & Head* "slightest nexus" test in favor of the more reasoned approach of the "contemplation" test applied in *Ex parte Warren*, 548 So. 2d 157 (Ala.), *cert. denied sub nom Jim Skinner Ford, Inc. v. Warren*, 493 U.S. 998 (1989). *Ex parte Jones*, supra, ___ So.2d at ___. The *Warren* test examines whether the parties "contemplated substantial interstate activity" at the time they entered into the contract and accepted the arbitration clause.[2] *Ex parte Warren*, supra, at

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[2] The standard in *Warren* better promotes our strong public policy against the use of predispute arbitration agreements. Its

160. Whether the parties contemplated substantial interstate commerce is, of course, to be determined by the facts and circumstances of each case.

The trial court applied the slightest nexus test when it compelled arbitration:

> "After hearing oral arguments and after consideration of the briefs and memoranda submitted by the parties, the Court has determined that the facts surrounding the Home Buyers contract do support a finding that the contract has at least [the] slightest nexus with interstate commerce so as to bring the contract under the purview of the FAA. Some of the facts supporting this finding are as follows: Home Buyers is a Colorado corporation and Plaintiff is an Alabama resident; if Plaintiff is not satisfied with the builder's performance, she must send an application to either Georgia or Colorado; the Home Buyers district office for the State of Alabama is in Tucker, Georgia; and the Home Buyers Claims & Warranty Service Office is in Denver, Colorado. As stated previously, the above facts indicate that the Home Buyers contract has at least [the] 'slightest nexus' with interstate commerce."

Mrs. Lopez contends that there is insufficient involvement with interstate commerce to require arbitration, because the house was built in Alabama by an Alabama builder for an Alabama resident and was listed

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"contemplation" test is to be applied exclusively in determining whether a contract involves interstate commerce for purposes of applying the FAA to arbitration disputes. *Continental Grain Co. v. Beasley*, [Ms. 1920241, July 16, 1993], ___ So.2d ___ (Ala. 1993).

for sale through an Alabama real estate agency. Home Buyers points to possible interstate activity by the Lopezes during their purchase and financing of the house, to support its contention that there was sufficient involvement with interstate commerce to require arbitration. "However, for the FAA to apply, *the agreement* that contains the predispute arbitration provision must involve interstate commerce." *Ex parte Jones*, supra, ___ So.2d at ___ (emphasis original). That agreement in this case is the Home Buyers warranty, not the contract for purchase of the house. The warranty does not involve "the production of articles to be shipped in interstate commerce," *Continental Grain Co.*, supra, ___ So.2d at ___; nor does it require the use of specific materials made by and shipped from out-of-state manufacturers. *Ex parte Brice Bldg. Co.*, 607 So.2d 132, 134 (Ala. 1992); *Maxus, Inc. v. Sciacca*, 598 So.2d 1376, 1379 (Ala. 1992).

Although Home Buyers contends that under the warranty Mrs. Lopez would have to file a claim in either Georgia or Colorado, we have determined that "[t]he mere use of the telephone and mail by persons in different states to communicate about activity that is purely local" is not a sufficient contact with interstate commerce to require application of the FAA. *First Real Estate Corp. of Alabama v. Brown Marx Tower Ltd. Partnership*, [Ms. 1911779, May 7, 1993] ___ So.2d ___ (Ala. 1993).[3] Furthermore,

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[3] Although *First Real Estate Corp.* applied the old "slightest nexus" test in finding insufficient involvement with interstate commerce to require arbitration, its reasoning is certainly applicable to the stricter test required by *Ex parte Warren* and *Ex parte Jones*. In *First Real Estate Corp.*, a New York partnership and an Alabama corporation with its principal place of business in New

it is the scope of the contract containing the arbitration clause, and not the place of performance, that determines the applicability of the FAA when using the "contemplation" test. *Continental Grain Co.*, supra, citing *Circle "S" Industries, Inc. v. Berryman*, 613 So.2d 329, 331 (Ala. 1993).

In this case, we find no evidence that the parties contemplated substantial interstate activity when they entered into the warranty contract. Therefore, the FAA does not apply. We hold that, under the "contemplation" test, Mrs. Lopez is not required to submit her warranty claims with Home Buyers to arbitration. See *Ex parte Alexander*, 558 So.2d 364, 366 (Ala. 1990). The writ is due to be granted for the foregoing reasons.

WRIT GRANTED.

Hornsby, C. J., and Almon, Houston, Steagall, and Kennedy, JJ., concur.

Ingram, J., concurs in the result.

Maddox and Adams, JJ., dissent.

Juliette G. Lopez v. Home Buyers Warranty Corp., et al.

MADDOX, JUSTICE (dissenting).

I disagree with the majority's use of the "contemplation" test for determining whether the particular transaction involves interstate commerce for purposes of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.* Furthermore, I disagree with the majority's conclusion

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York were found to have insufficient contacts with interstate commerce in a dispute over an Alabama corporation's management of their property within Alabama.

that the trial court erred in compelling arbitration of Mrs. Lopez's claims.

The threshold question is whether the FAA applies to this case. If the Act applies, as I believe it does, then the predispute arbitration agreement is enforceable, see 9 U.S.C. § 2, and whether the agreement would otherwise be unenforceable under Alabama law, see Ala. Code 1975, § 8-1-41(3), would be immaterial.

Does the home warranty agreement involve interstate commerce so as to invoke the FAA and thereby render the arbitration agreement enforceable? I believe that it does.

Section 2 of the FAA provides, in pertinent part, that "[a] written provision in any maritime transaction or a contract evidencing a transaction involving interstate commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable." As the United States Supreme Court has held, in enacting this section, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration. . . . Congress has thus mandated the enforcement of arbitration agreements." *Southland Corp. v. Keating*), 465 U.S. 1, 10 (1984). The Supreme Court noted in *Keating* that the FAA "permits 'parties to an arbitrable dispute [to move] out of court and into arbitration as quickly and easily as possible," 465 U.S. at 7 (quoting in part *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 22 (1983)) (bracketed words added in *Keating*. The Supreme

Court also noted: "Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate." *Id.*

The United States Supreme Court has also characterized the FAA as "a statute that embodies Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause." *Perry v. Thomas,* 482 U.S. 483, 490 (1987). The House Judiciary Committee Report on the arbitration bill also reflects Congress' intent. That report states in part: "Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him. An arbitration agreement is placed upon the same footing as other contracts, where it belongs." H. R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924); see also *Ex parte Alabama Oxygen Co.,* 433 So. 2d 1158, 1170 (Ala. 1983) (Maddox, J., dissenting). In *Alabama Oxygen,* after remand from the United States Supreme Court for further consideration in light of *Keating,* this Court adopted my dissent as its opinion. *Ex parte Alabama Oxygen Co.,* 452 So. 2d 860, 861 (Ala. 1984); see also *Ex parte McKinney,* 515 So. 2d 693 (Ala. 1987).

This Court held in *Ex parte Costa & Head (Atrium), Ltd.,* 486 So. 2d 1272 (Ala. 1986), that "[t]he requirement of the FAA that an arbitration agreement 'involve interstate commerce' has been construed very broadly so that the slightest nexus of the agreement with interstate commerce will bring the agreement within the ambit of the

FAA." 486 So. 2d at 1275 (citations omitted). I realize that a majority of this Court rejected this "slightest nexus" test in *Ex parte Jones*, [Ms. 1920249, July 16, 1993] ___ So. 2d ___ (Ala. 1993), but I believe that *Jones* is wrong. See *Jones*, ___ So. 2d at ___ (Maddox, J., dissenting); and *Continental Grain Co. v. Beasley*, [Ms. 1920241, July 16, 1993] ___ So. 2d ___ (Ala. 1993) (Maddox, J., concurring in the result).

For the reasons cited by the trial court in that part of its order quoted in the majority opinion, I believe that the home warranty agreement, which was transferred to Mrs. Lopez, meets the "slightest nexus" test and that the trial court properly compelled arbitration of the claims; therefore, I respectfully dissent.

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

JULIETTE G. LOPEZ, Plaintiff,	)	
VS.	)	CASE NO. CV-91-897
HOME BUYERS WARRANTY CORPORATION II; JACK DEAL; and ARONOV REALTY COMPANY, INC., et al., Defendants.	)	

ORDER

This matter has been submitted to this Court upon a Motion to Dismiss or in the Alternative to Require Plaintiff to Submit to Arbitration, filed by Defendant Home Buyers Warranty Corporation II (Home Buyers). The Plaintiff, Juliette Lopez, argues that arbitration is not proper in this case.

The contract upon which Plaintiff's case is based contains the following language: "VII. Conciliation and Arbitration – Should the Builder or Homebuyer(s) disagree with the Insurer's decision to deny the claim as recommended by the Service, the contesting party shall call for conciliation with the Service or an arbitration to be conducted by the American Arbitration Association (A.A.A.), or other mutually agreeable arbitration service. . . . " Plaintiff asserts two grounds as to why the arbitration clause in the contract is not enforceable against her: (1) Plaintiff never signed the contract, and therefore, has not agreed to submit herself to arbitration;

and (2) Under § 8-1-41, *Code of Alabama*, 1975, an agreement to submit a controversy to arbitration cannot be specifically enforced. This court addresses both of these issues as follows.

With regard to Plaintiff's first argument, the Court finds that Plaintiff's complaint is based upon the contract containing the arbitration clause set out above. The contract was originally between the former owners of the house in question (the Browders) and Home Buyers. Neither Plaintiff nor her late husband signed the contract. This Court notes that generally, "persons who are not parties to a contract are not bound by the provisions of that contract." *A. L. Williams & Associates, Inc. v. McMahon*, 697 F.Supp. 488, 493 (N.D.Ga. 1988). The Plaintiff herself relies on a portion of the contract as a basis for her claims. The *A. L. Williams* case, *supra*, logically holds that this necessarily subjects Plaintiff to all parts of that contract, including the arbitration clause. "[A] party cannot have it both ways; it cannot rely on a contract when it works to its advantage and then repute it when it works to its disadvantages. Therefore, in this case the court will not allow [respondent] to assert claims allegedly arising out of the agreements executed by [a 3rd party] without requiring her also to abide by the arbitration clauses in those agreements." *Id.* at 494. Plaintiff cannot adopt the contract as a basis for her claims without agreeing to the arbitration clause as well. Therefore, Plaintiff's first argument that she is not subject to the arbitration clause since she never signed the contract is without merit.

Plaintiff's second argument as to why she should not be required to submit her claims to arbitration is that in Alabama, agreements to submit a matter to arbitration

are not enforceable. Home Buyers, however, argues that the Federal Arbitration Act (FAA) applies to this contract, preempting Alabama law, and therefore, the arbitration clause should be upheld. Where it applies, the FAA provides for the enforcement of arbitration agreements. *A. G. Edwards & Sons, Inc. v. Syrrud*, 597 So.2d 197 (Ala. 1992). The FAA applies where the contract in question "[1] was one involving interstate commerce . . . and [2] the contract contained an arbitration agreement voluntarily entered into by the parties." *Ex parte Warren*, 548 So.2d 157, 159 (Ala. 1989), *cert. denied sub. nom. Jim Skinner Ford, Inc. v. Warren*, 493 U.S. 998 (1989). Since the second prong of the above FAA applicability test has been met (see previous discussion regarding Plaintiff's adoption of the contract), the final question left to be determined by this Court is whether the contract was one "involving interstate commerce."

The Alabama Supreme Court has issued two seemingly differing opinions on what constitutes "involving interstate commerce." In 1986, *Ex Parte Costa & Head (Atrium), Ltd.*, 486 So.2d 1272, 1975 (Ala.) declared that "[t]he requirement of the FAA that an arbitration agreement 'involve interstate commerce' has been construed *very broadly* so that the *slightest nexus* of the agreement with interstate commerce will bring the agreement within the ambit of the FAA." Home Buyers argues that this "slightest nexus" test should be applied in the case at bar to determine whether the contract falls under the FAA.

In 1989, the Alabama Supreme Court stated in *Ex Parte Warren, supra*, that the applicable standard for that case was " 'whether at the time [the parties] entered into [the contract] and accepted the arbitration clause, they

contemplated substantial interstate activity.' " Plaintiff argues that this contemplation of substantial interstate activity standard should be used in the present case.

The Alabama Supreme Court recently clarified the law in this area in *Ex Parte Brice Building Company*, released July 17, 1992 (Docket No.s 1910190, 1910214), by stating: "The *Warren* case was expressly addressed by this Court with regard to its 'narrow factual context.' Implicity, we have recognized that the *Costa* standard, rather than the *Warren* standard, is the appropriate standard to utilize within the factual context of this case." Therefore, the "slightest nexus" test is the appropriate standard to be used in the present case to determine whether the FAA applies to the Home Buyers contract.

After hearing oral arguments and after consideration of the briefs and memoranda submitted by the parties, the Court has determined that the facts surrounding the Home Buyers contract do support a finding that the contract has at least a slightest nexus with interstate commerce so as to bring the contract under the purview of the FAA. Some of the facts supporting this finding are as follows: Homer Buyers is a Colorado corporation and Plaintiff is an Alabama resident; if Plaintiff is not satisfied with the builder's performance, she must send an application to either Georgia or Colorado; the Home Buyers district office for the State of Alabama is in Tucker, Georgia; and the Home Buyers Claims & Warrant Service Office is in Denver, Colorado. As stated previously, the above facts indicate that the Home Buyers contract has at least a "slightest nexus" with interstate commerce.

Therefore, pursuant to the FAA, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. Plaintiff shall submit herself to arbitration as per the terms of the Conciliation and Arbitration clause of the contract;

2. This action is due to be and is hereby DISMISSED; and

3. Costs of these proceedings are taxed against the Plaintiff, for which let execution issue.

DONE this the 19th day of October, 1992.

/s/ Joseph D. Phelps
JOSEPH D. PHELPS,
CIRCUIT JUDGE

cc: Jere Beasley
J. Cole Portis
BEASLEY, WILSON

Dennis Bailey
RUSHTON, STAKELY, JOHNSTON & GARRETT

Philip Gidiere
CARPENTER & GIDIERE

IN THE SUPREME COURT OF ALABAMA
September 24, 1993

1920330

Juliette G. Lopez v. Home Buyers Warranty Corporation, et al. (Montgomery: CV-91-897)

NOTICE

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

SHORES, J. – Hornsby, CJ., Almon, Houston, Steagall and Kennedy, JJ., concur;
Maddox and Adams, JJ., dissent

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith sat out as same appear(s) of record in said Court.

Witness my hand this 24 day of Sept. 1993.

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

9 U.S.C. § 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce. July 30, 1947, c. 392, 61 Stat. 670.

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9 U.S.C. § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be

valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

July 30, 1947, c. 392, 61 Stat. 670.

Code of Alabama 1975

§ 8-1-41. Obligations which cannot be specifically enforced.

The following obligations cannot be specifically enforced:

* * *

(3) An agreement to submit a controversy to arbitration;

* * *

Ex Parte Bruce M. JONES
(Re: Bruce M. JONES,

Charles S. CALDWELL, III and Automatic Detection Systems, Inc.).
1920249.
Supreme Court of Alabama.
July 16, 1993

KENNEDY, JUSTICE.

This mandamus proceeding stems from a lawsuit involving a dispute over a stock purchase agreement between the plaintiff/petitioner, Bruce M. Jones, and the defendant/respondent Charles S. Caldwell III. Jones seeks a writ of mandamus requiring the Jefferson County Circuit Court to set aside its order directing arbitration as to some of Jones's claims. We grant the writ.

Caldwell is the majority shareholder and president of Automatic Detection Systems, Inc. ("ADS"). ADS is an Alabama corporation that sells, installs, maintains, and monitors security system equipment. ADS is also a defendant in the underlying action.

Jones owned all of the stock in another Alabama corporation, Birmingham Protection Systems, Inc. ("BPS"). In November 1990, Caldwell, individually, entered into a stock purchase agreement with Jones. Under the agreement, Jones, as the sole stockholder of BPS, was to sell Caldwell his BPS stock. This agreement contained an arbitration provision requiring that disputes

regarding the stock agreement be arbitrated. Later, such disputes arose and Jones sued.[1]

The trial court ordered arbitration. At issue in this mandamus proceeding is whether the stock purchase agreement "involves interstate commerce," and thus, invokes the Federal Arbitration Act, which would render the arbitration provision in the contract enforceable.

Predispute arbitration agreements are not unenforceable [sic] under Alabama Law. Ala. Code 1975, s 8-1-41. If, however, an arbitration agreement was voluntarily entered into, and relates to a contract involving interstate commerce, the Federal Arbitration Act, 9 U.S.C. s 1 et seq. (the "FAA") applies, and preempts Alabama law. See Ex parte Alabama Oxygen Co., 433 So.2d 1158 (Ala. 1983) (Maddox, J., dissenting), review after remand from United [sic] Supreme Court, 452 So.2d 860 (Ala. 1984) (adopting views expressed in Justice Maddox's original dissent); A. G. Edwards & Sons, Inc. v. Syvrud; 597 So.2d 197 (Ala. 1992). Under the FAA, a predispute arbitration agreement – in the context of a contract involving interstate commerce – is enforceable. Id.

At the outset, we note that ADS was not a party to the stock purchase agreement. Thus, ADS has no standing to seek enforcement of the arbitration provision therein, and it would be error for the trial court to compel

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[1] There are also disputes between the parties as to an "independent consulting agreement" between ADS and Jones, but the issues here relate solely to the trial court's order requiring the arbitration of claims arising under the stock purchase agreement.

arbitration of claims against ADS, under this arbitration provision. We do not necessarily read the trial court's order to so require, but we address this question nonetheless, because the parties suggest that they so read the trial court's order.

We turn to the dispositive issue before us, whether the agreement between Caldwell and Jones involved "interstate commerce." In this regard, Caldwell, citing Ex parte Costa & Head (Atrium), Ltd., 486 So.2d 1272, 1275 (Ala. 1986), argues that even the "slightest nexus" of an agreement with interstate commerce will bring the agreement within the scope of the FAA. See Ex parte Brice Building Co., 607 So.2d 132 (Ala. 1992). Caldwell discusses, in this regard, ADS and BPS's interstate connections outside the agreement. Caldwell concedes that the stock purchase agreement between himself and Jones makes no reference to any interstate matters. However, for the FAA to apply, the agreement that contains the predispute arbitration provision must involve interstate commerce.

Our review of the record indicates that the agreement relates to the sale of all the stock in an Alabama corporation (located solely within Alabama), between two Alabama businessmen, negotiating within Alabama to create an agreement consisting of duties and obligations to be performed within Alabama. Based on these facts, we hold that the FAA does not apply.

Although one could reasonably conclude that the agreement had not even the "slightest nexus" with interstate commerce, we reach our holding by applying the standard set out in Ex parte Warren, 548 So.2d 157 (Ala.

1989), for determining whether a contract involves interstate commerce, rather than the Costa "slightest nexus" standard. The Warren standard is "[W]hether at the time, [the parties] entered into [the contract] and accepted the arbitration clause, they contemplated substantial interstate activity." 548 So.2d at 160 (quoting Metro Industrial Painting Corp. v. Terminal Constr. Co., 287 F.2d 382, 387 (2d Cir. 1961) (emphasis in Metro), cert. denied, 368 U.S. 817 (1961).

In Warren the Court declined to apply the Costa "slightest nexus" standard and implicitly overruled it in a "narrow" set of circumstances. Warren, 548 So.2d at 160. Warren, which involved a retail automobile sales contract, had a very limited applicability, as was indicated by the Warren opinion itself and as subsequent cases suggested. Noting this, we observed in Ex parte Brice Bldg. Co., 607 So.2d 132 (Ala. 1992); "The Warren case was expressly addressed by this Court with regard to its 'narrow factual context.' . . . "In H.L. Fuller Constr. Co. v. Industrial Dev. Bd. of [the] Town of Vincent, 590 So.2d 218 (Ala. 1991), decided after Warren, we restated the Costa standard. H.L. Fuller Constr. involved a construction contract. . . . We restated the Costa standard, but did not go on to apply it. . . . "In Roscoe v. Jones, 571 So.2d 1043 (Ala. 1990), another construction contract case, we reemphasized that Warren has a 'narrow application.' Id. at 1046." 607 So.2d at 134. (Emphasis original.)

To resolve any inconsistency or confusion generated by the existence of two different standards, and determining, as we now do, that Warren represents a more reasoned approach than the Costa standard, we overrule any case inconsistent with Warren to the extent that it

states a different standard for determining the involvement of interstate commerce.

In this case, because the FAA does not apply, Alabama law renders the arbitration provision unenforceable. Ala. Code 1975, s 8-1-41; Wells v. Mobile County Bd. of Realtors, Inc., 387 So.2d 140 (Ala. 1980).

WRIT GRANTED.

Hornsby, C. J., and Almon, Shores, Houston, and Steagall, JJ., concur.

Maddox and Ingram, JJ., dissent.

MADDOX, JUSTICE (dissenting).

I respectfully dissent. I disagree with the majority as to the applicable test for determining whether a transaction involves interstate commerce for purposes of the FAA. I also believe that the stock purchase agreement containing an arbitration clause involves interstate commerce and, therefore, that the trial court properly granted the motion to compel arbitration.

I.

In determining whether a transaction involves interstate commerce, I believe that the "slightest nexus" test set forth in Ex parte Costa & Head (Atrium), Ltd., 486 So. 2d 1272 (Ala. 1986), and not the "contemplation" test set forth in Ex parte Warren, 548 So. 2d 157 (Ala.), cert. denied sub nom. Jim Skinner Ford, Inc. v. Warren, 493 U.S. 998 (1989), provides the proper analysis. See Warren, 548 So. 2d at 160-63 (Maddox. J., dissenting). Although

the majority concludes "that Warren represents a more reasoned approach than the Costa standard," So. 2d at, the majority also recognizes that Warren "had a very limited applicability, as was indicated by the Warren opinion itself and as subsequent cases suggested." So. 2d at.

Indeed, Warren's "contemplation" test has been applied in only two contexts – those involving automobile sales contracts between dealers and consumers, see Warren and Ex parte Williams, 555 So. 2d 146 (Ala. 1989), and those, like this present case, involving stock purchase agreements. See Ex parte Clemants, 587 So. 2d 317 (Ala. 1991). That this Court has applied the "contemplation" test sparingly indicates "that Warren has a 'narrow application.' " Ex parte Brice Building Co., 607 So. 2d 132, 134 (Ala. 1992) (quoting in part Roscoe v. Jones, 571 So. 2d 1043, 1046 (Ala. 1990)). In contrast, in addition to cases involving construction contract disputes, such as Brice Building Co., this Court has also recently applied the "slightest nexus" test in a number of other contexts. See First Real Estate Corp. of Alabama, Inc. v. Brown Marx Tower Ltd., [Ms. 1911779, May 7, 1993] So. 2d (Ala. 1993) (real estate management agreement); Circle S. Industries, Inc. v. Berryman, 613 So. 2d 329 (Ala. 1993) (consent judgment involving agreement not to compete), Garikes, Wilson, & Atkinson, Inc. v. Episcopal Foundation of Jefferson County, Inc., 614 So. 2d 447 (Ala. 1993) (contract for architectural services); and A. J. Taft Coal Co., Inc. v. Randolph, 602 So. 2d 395 (Ala. 1992) (mining lease).

Because this Court had already adopted the "slightest nexus" test in Costa & Head, its adoption of the "contemplation" test in Warren has been criticized as "creating a double standard." Stanley D. Bynum & J. David Pugh, Enforcing Arbitration Agreements in Alabama: A Double Standard Dilemma, 54 Ala. Law, 38, 43 (January 1993). Bynum and Pugh wrote that Costa & Head "brought Alabama law generally in line with the majority of other jurisdictions" but that Warren "is inconsistent with all other jurisdictions that have addressed the issue." Id. at 38-39 and 41. The authors particularly criticized Warren's "contemplation" test for its subjectivity. Id. at 43.

I do not think that the United States Supreme Court's denial of the petition for certiorari in Warren should be viewed as that Court's imprimatur of the "contemplation" test, because a denial of a petition for certiorari has no significance in regard to the merits. Parker v. Ellis, 362 U.S. 574, 576 (1960).[2]

Based on the foregoing, I believe that the "slightest nexus" test gives more effect to Congress's intent in enacting the FAA, which was "to provide for the enforcement of arbitration agreements within the full reach of

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[2] For example, last year the United States Supreme Court denied a petition for certiorari review raising the issue of whether the principle of Batson v. Kentucky, 476 U.S. 79 (1986), applies to gender-based peremptory strikes, Murphy v. State, 596 So. 2d 42 (Ala. Cr. App. 1991), cert. denied, U.S., 113 S. Ct. 86 (1992), but in another case that Court has recently granted a certiorari petition raising the same issue. J.E.B. v. State, 606 So. 2d 156 (Ala. Civ. App. 1992), cert. granted, U.S., [92-1239, May 17, 1993].

the Commerce Clause." Perry v. Thomas, 482 U.S. 483, 490 (1967). I am unwilling to overrule recent, well-reasoned cases applying the test this court adopted in Costa & Head.

II.

Regarding whether the arbitration agreement in this case is enforceable, I note that "[a]rbitration clauses contained in contracts involving stock purchases are enforceable." Warren, 548 So. 2d at 161 n.2 (Maddox, J., dissenting) (citing Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987)). I believe that the stock purchase agreement in this case had at least the "slightest nexus" with interstate commerce, so that the arbitration agreement is specifically enforceable pursuant to the FAA. Consequently, I must respectfully dissent.

Ingram, J., concurs.

Supreme Court, U.S.
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No. 93-995

In The

Supreme Court of the United States

October Term, 1993

HOME BUYERS WARRANTY CORPORATION II, and NATIONAL HOME INSURANCE COMPANY,

Petitioners,

vs.

JULIETTE G. LOPEZ,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether certiorari review is necessary where the dispositive issue is the Alabama Supreme Court's factual determination that a warranty contract containing an arbitration provision does not sufficiently "involve" interstate commerce to invoke the provisions of the Federal Arbitration Act?

2. Whether certiorari review is necessary for Petitioners' claim that Alabama Supreme Court decisions concerning the Federal Arbitration Act conflict with decisions by this Court?

3. Whether certiorari review is necessary for Petitioners' claim that Alabama Supreme Court decisions concerning the Federal Arbitration Act conflict with the decisions of some United States courts of appeal?

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STATEMENT OF THE CASE

Juliette Lopez filed this action, asserting claims based on a warranty contract involving Home Buyers Warranty Corporation, II ("HBW"), and National Home Insurance Company ("NHIC"). HBW and NHIC filed a motion to compel arbitration, and the circuit court of Montgomery County, Alabama granted that motion. Ms. Lopez appealed the order to the Alabama Supreme Court.

On August 20, 1993, the Alabama Supreme Court granted a writ of mandamus compelling the circuit court to vacate its order. Petitioners argued to both the circuit court and the Alabama Supreme Court as if the contract containing the arbitration provision — and the associated facts concerning interstate commerce — was the contract for the purchase of the house. Significantly, the Alabama Supreme Court noted that the arbitration provision involved in this case was contained in the warranty contract involving the Petitioners, *not* in the contract to purchase the house. Based on that distinction, which Petitioners fail to acknowledge even to this Court, the Alabama Supreme Court held that factually there was insufficient evidence that the arbitration provisions of the warranty contract involved interstate commerce to invoke the Federal Arbitration Act ("FAA").

HBW and NHIC filed their certiorari petition. They argue as if their true objection is to the standard used by the Alabama Supreme Court to determine if a contract involves interstate commerce so as to invoke the FAA. Ms. Lopez will show that this Court need not review that standard, and that Petitioners are actually seeking review of the factual findings of the Alabama Supreme Court. Certiorari need not be granted to review those factual determinations.

SUMMARY OF THE ARGUMENT

There is nothing unusual or spectacular about this case despite Petitioners' frantic tone. The Alabama Supreme Court made a factual determination supportable under any standard that the warranty contract containing the arbitration provision did not involve interstate commerce. Petitioners effectively concede that the test itself they challenge can be used to broaden the applicability of the FAA by a court making a factual determination that the FAA applies. Rhetoric notwithstanding, it is the factual determination in this case that Petitioners actually challenge.

There is no conflict between the decisions of the Alabama Supreme Court and decisions of this Court or the United States courts of appeal. Petitioners do not state fully Alabama's law on the challenged test. Viewed in full context, Petitioners' cases are distinguishable. For all these reasons, certiorari review of this case is unnecessary.

REASONS FOR DENYING THE WRIT

I.

CERTIORARI REVIEW IS UNNECESSARY, BECAUSE PETITIONERS' SELF-CONTRADICTORY POSITION ON THE MERITS OF THE TEST USED BY THE ALABAMA SUPREME COURT SHOWS THAT IT IS THE FACTUAL APPLICATION OF THE TEST WITH WHICH THE PETITIONERS ACTUALLY DISAGREE.

A. Petitioners Contradict Themselves On The Substantive Effect Of The Test They Challenge.

Petitioners continuously complain about the "contemplation" test used by the Alabama Supreme Court, saying that it functions to *restrict* the applicability of the FAA. (*See, e.g.*, page 12, Certiorari

Petition.) They contradict themselves, however, in the process of trying to distinguish the cases from which the Alabama Supreme Court took the test:

> [The opinion in which Petitioners contend the contemplation test originated] addressed the "involving commerce" question, *not for the purpose of restricting the reach of the FAA* . . . but [to address] whether the agreement on its face "evidences interstate traffic." 287 F.2d, at 387.
>
> North Carolina's Supreme Court, which sometimes relies on [the] "contemplation" language, does so not to further an anti-arbitration policy, *but to broaden the reach of the FAA and rebut arguments that it does not apply* . . . .

(Emphasis added). Pages 12-13, HBW and NHIC's Petition for a Writ of Certiorari.

Petitioners acknowledge that the *contemplation test itself* is not necessarily restrictive of the applicability of the FAA.[1] To the contrary, according to Petitioners, the contemplation test was written "not for the purpose of restricting the reach of the FAA," and the test can be used as a matter of fact "to broaden the reach of the FAA." By acknowledging that the *contemplation test itself* is usable to broaden the FAA, Petitioners acknowledge that *the test itself is not deficient.* The deficiency, if there is any, must be in the *application* of the test to the facts of a case. Petitioners cannot

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1. Petitioners do not show *any differences whatsoever* in the Alabama formulation of the test than in the cases where they acknowledge the test as not restrictive of the FAA and usable to broaden it.

admit that, however, without having to convince this Court their petition deserves review because of the factual determination by the Alabama Supreme Court.

B. The Application Of The Substantial Contemplation Test To The Facts Of The Case Is The Source Of The Petitioners' True Disagreement Raised In This Petition For A Writ Of Certiorari.

The Constitution of Alabama provides broad jurisdiction to the Alabama Supreme Court. With no intermediate appellate review, the Alabama Supreme Court reviews a circuit court ruling concerning a motion to arbitrate by a petition for writ of mandamus to that circuit court. *Ex Parte Alexander,* 558 So. 2d 364, 365 (Ala. 1990). As opposed to certiorari review, the Alabama Supreme Court reviews, as a matter of an appellant's right, mandamus petitions filed on motions to arbitrate. Accordingly, the Alabama Supreme Court often serves to correct factual errors in rulings by the circuit court.

The Alabama Supreme Court found "no evidence" that the contract involved interstate commerce. *Lopez v. Home Buyer's Warranty Corp. et al.,* 628 So. 2d 361, 364 (Ala. 1993). As a practical matter, that finding is what the Petitioner seeks to have this Court reverse. Certiorari review is unnecessary for that purpose.

There is nothing spectacular or unusual about this case. The warranty contract, not the contract for the house purchase, contained the arbitration provision. The only evidence indicating that the warranty contract involved interstate commerce was that it provided that any claims under the warranty should be filed in either Denver, Colorado, or Tucker, Georgia. Petitioner's other factual arguments about whether the contract "involved" commerce address the *contract for the purchase of the house.*

Please imagine Ms. Lopez' response if under these facts the Alabama Supreme Court had determined that the warranty contract containing the arbitration provision involved interstate commerce. Ms. Lopez would say what Petitioners said: the contemplation test is usable "to *broaden* the reach of the FAA and rebut arguments that it does not apply." Ms. Lopez would argue that the test was too broad, too burdensome. Of course, Ms. Lopez' real complaint would be with the factual application of that test, just like the Petitioners.

Under the facts of this case, there was no interstate commerce involved in the warranty contract that contained the arbitration clause. Even if this Court thought the contemplation test deserved review, the virtually non-existent factual basis for a finding of interstate commerce would likely limit the precedential value of the case and virtually require affirmance. Certiorari review is unnecessary, and the certiorari petition is due to be denied.

II.

CERTIORARI REVIEW IS UNNECESSARY, BECAUSE ALABAMA SUPREME COURT DECISIONS ON THE FEDERAL ARBITRATION ACT DO NOT CONFLICT WITH DECISIONS BY THIS COURT.

A. Petitioners' Argument About The State Of The Law Involving The Contemplation Test In Alabama Is Inaccurate.

Section II of the FAA declares that written agreements to arbitrate:

> In any maritime transaction or a contract evidencing a transaction *involving commerce* . . . shall be valid . . . .

(Emphasis added).

Obviously, arbitration clauses in contracts "involving commerce" are enforceable. "Commerce" is broadly defined in relation to the FAA at 9 U.S.C., § 1, and, as Ms. Lopez shows in Section III of this brief, there has been litigation concerning the meaning of "commerce" in relation to the FAA. The Alabama Supreme Court analyzes the applicability of the FAA by determining whether "commerce" is *involved* in the contract containing the arbitration clause. *Lopez v. Home Buyers Warranty Corporation, et al.*, 628 So. 2d 361 (Ala. 1993); *The Terminix Int. Co. LP v. Jackson*, 628 So. 2d 357 (Ala. 1993); *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 628 So. 2d 354 (Ala. 1993). To determine whether "commerce" is *involved* in a contract containing an arbitration clause, Alabama courts determine whether the parties contemplated that the contract involved substantial interstate activity at the time the parties entered into the contract and accepted the arbitration clause. *Lopez v. Home Buyers Warranty Corporation, et al.*, 628 So. 2d 361 (Ala. 1993); *The Terminix Int. Co. LP v. Jackson*, 628 So. 2d 357 (Ala. 1993). In other words, the test Petitioners challenge does not define "commerce", but, instead, analyzes whether "commerce" is *involved* in a contract containing an arbitration clause.

Petitioners argue that the analysis of whether the parties contemplated substantial interstate activity is completely subjective. That is inaccurate. The actual standard, both as stated and as applied, looks at both objective and subjective criteria. For example, in *The Terminix Int. Co. LP v. Jackson*, 628 So. 2d 357 (Ala. 1993) the Alabama Supreme Court considered some subjective criteria, but also wrote that the performance of the contract:

> did not involve interstate commerce to such a degree that a reasonable person must have contemplated substantial interstate activity when they entered into the contract.

628 So. 2d at 359. Consideration of "reasonable persons" is obviously objective criteria. Even clearer, the Alabama Supreme Court in *Allied-Bruce Terminix Companies v. Dobson*, 628 So. 2d 354 (Ala. 1993) explicitly stated the criteria for evaluating whether the parties contemplated substantial interstate activity as containing both subjective and objective criteria:

> Cogent evidence regarding their state of mind at the time would be *the terms of the contract, and if it, on its face, evidences interstate traffic . . . the contract should come within Section II [of the FAA]*. In addition, evidence as to how the parties expected the contract to be performed and how it was performed is relevant to whether substantial interstate activity was contemplated.

(Emphasis added). 628 So. 2d at 355. Accordingly, this is not a purely subjective analysis, but rather an analysis focusing on both objective and subjective factors.

Petitioners also claim that Alabama courts do not recognize that the FAA preempts Alabama's policy against predispute arbitration clauses. That claim does not withstand scrutiny. *In every case* involving the FAA, the Alabama Supreme Court recognizes that the FAA preempts state law. For example, in *The Terminix Int. Co. LP v. Jackson* the Alabama Supreme Court stated:

> If an arbitration clause is contained in the contract that involves Interstate Commerce, then the Federal Arbitration Act, 9 U.S.C. Section 1 *et seq.*, preempts state law. Under the FAA, arbitration clauses are specifically enforceable.

628 So. 2d at 359.

Moreover, Petitioners' argument that the Alabama Supreme Court favors Alabama policies over the FAA is circular to the issue of whether the standard challenged in the certiorari petition is appropriate for determining if the FAA applies. That argument by Petitioners is purely emotional, not logical. If the standard for determining the applicability of the FAA is appropriate, then Alabama law is appropriately preempted, considering that in every single case involving the FAA the Alabama Supreme Court has recognized that the FAA preempts Alabama law. Nevertheless, Petitioners imply that the Alabama Supreme Court is somehow circumventing the Supremacy Clause by not allowing federal law to preempt state law. That is untrue, but if unaddressed, Petitioners' tactic could cause confusion when considering the decisions of this Court and some decisions of United States courts of appeal.

B. The Holdings By The Alabama Supreme Court Do Not Conflict With Decisions Of This Court.

Petitioners claim that Alabama Supreme Court holdings conflict with *Southland Corporation v. Keating*, 465 U.S. 1 (1984) and *Perry v. Thomas*, 482 U.S. 483 (1987). Neither *Southland Corporation v. Keating* nor *Perry v. Thomas* addressed the issue raised by Petitioners — whether the contemplation test used by the Alabama Supreme Court is improper.

In *Southland Corp. v. Keating*, 465 U.S. 1 (1984), this Court addressed a California statutory ban on arbitration of claims brought in state court under a state franchise law. This Court held that Section 2 of the FAA is applicable in both state and federal courts and that the California statute was preempted. Petitioners here challenge the contemplation standard for determining whether commerce is "involved" in a contract containing an arbitration clause, not a specific state statute that outlaws

arbitration in certain cases no matter what.[2]

Petitioners cite *Southland Corporation v. Keating* for the general proposition that Congress with the FAA declared a national policy favoring arbitration of claims that the contracting parties agreed to resolve by arbitration. *See* 465 U.S. at 14. Even assuming Petitioners are correct, any existence of a national policy favoring arbitration does not create a conflict between Alabama and this Court's cases unless one shows that the Alabama courts favor Alabama policies over the FAA. As stated immediately above, Petitioners' arguments concerning favoritism are circular to the issue of whether the contemplation standard is proper, because if the contemplation standard is proper, Alabama courts properly preempt Alabama law.

Perry v. Thomas, 482 U.S. 483 (1987) is distinguishable. In *Perry*, the issue was what matters were and what matters were not subject to the FAA and arbitration. The case involved a stockbroker's dispute with a national stock brokerage firm that employed him over commissions paid in connection with the sale of certain stocks. This Court addressed whether Section 2 of the FAA preempted Section 29 of the California Labor Code, which provided that actions for collection of wages were not subject to private arbitration agreements. Again, as in *Southland*, what was challenged was a specific state statute outlawing arbitration in certain cases no matter what. This Court determined that the FAA applied to the case and held accordingly that the FAA preempted the state law.

Petitioners cite *Perry v. Thomas* for the phrase stating that the FAA is a statute "that embodies Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the

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2. There is no argument that Alabama's statute opposing predispute arbitration is illegal and is due to be vacated.

commerce clause." 482 U.S. at 490. Petitioners use that language to argue that the contracts at issue here must somehow involve commerce within the meaning of the FAA. In *Perry*, the issue was what matters were and what matters were not subject to the FAA. Read in context, the Petitioners' quoted phrase refers to Congress' exercising its power to resolve what issues are arbitrable. *Perry* did not say that Congress had in fact decided to subject every contract to the FAA. It stated that if a contract is, in fact, governed by the FAA, then inconsistent state law is preempted. It determined that the transactions addressed by the challenged statute were indeed within the FAA.

Perry did not speak to the issue presented here, which is whether there is evidence that would allow a court to decide that the warranty contract *involves* "commerce," so that the FAA is invoked. There is no legal dispute properly raised by Petitioners concerning the definition of "commerce." As explained earlier, the test Petitioners challenge does not define "commerce" but, instead, analyzes whether "commerce" is *involved* in a contract and arbitration clause. That "commerce" was not *involved* was factually determined by the Alabama Supreme Court, and that factual determination need not be reviewed.[3]

Petitioners attempt to create a gloss implying that the contemplation test somehow diminishes any policy favoring arbitration mentioned by this Court in *Southland Corporation* or *Perry v. Thomas*. Petitioners themselves stated that the *contemplation test itself* was created "not for the purpose of restricting the reach of the FAA," and that it is usable "to *broaden* the reach of the FAA and rebut arguments that it does not apply." As always, it is not the contemplation test itself that the

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3. Of course, in *Perry v. Thomas* there was almost no doubt that the action involved "commerce." The dispute in *Perry* involved a stock broker on a national stock brokerage exchange and sales of stocks on national stock exchanges.

Petitioners actually object to; instead, as Ms. Lopez has consistently shown, Petitioners object to the application of the facts to that test. That objection does not deserve certiorari review. The petition for a writ of certiorari is due to be denied.

III.

CERTIORARI REVIEW IS UNNECESSARY, BECAUSE ALABAMA SUPREME COURT DECISIONS ON THE FEDERAL ARBITRATION ACT DO NOT CONFLICT WITH THE DECISIONS OF ANY FEDERAL COURTS OF APPEAL.

The United States courts of appeal's cases cited by Petitioners show controversies over whether "commerce," existed. Because the contemplation standard does not define "commerce," the cases cited by Petitioners are distinguishable.[4] Even assuming that the test did define "commerce," any differences in holdings results from the factual analysis by the courts, not because of the contemplation test. Compared to the interstate commerce in Petitioners' cited cases, in this case the only evidence indicating that the warranty contract involved interstate commerce was that it provided that any claims under the warranty should be filed in Denver, Colorado or Tucker, Georgia.[5]

To avoid inundating the Court with a morass of factual details, Ms. Lopez will only briefly address each case. *Snyder v. Smith*, 736 F.2d 409 (7th Cir. 1984), *cert. denied*, 469 U.S. 1037 (1985)[6]

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4. This is explained in detail in Section II.A.

5. The other facts the Petitioners assert as relating to commerce address the contract for the purchase of the house, which did not contain the arbitration provision.

6. In their Alabama Supreme Court brief, Petitioners characterized the (Cont'd)

involved a contract dispute between Illinois residents who formed a partnership concerning property and business activities in Texas. In *Del E. Webb Construction v. Richardson Hospital Authority*, 823 F.2d 145 (5th Cir. 1987) the court factually determined that in this dispute over a construction contract:

> The contract involved persons from different states; employees of the plaintiff traveled interstate; the interstate mails were used to facilitate the work of the plaintiff's subcontractors; and the materials used in the construction on the defendant's facilities were manufactured and moved in interstate commerce.

823 F.2d at 147.

Foster v. Turley, 808 F.2d 38 (10th Cir. 1986) involved a contract dispute over an agreement to purchase half of a New Mexico mine where the output of the mine went into interstate commerce. The buyer was in Oregon; he sent trucks to New Mexico; proceeds were sent to him in Oregon; and the mine products were sometimes milled and sold outside New Mexico.

Mesa Operating Limited Partnership v. Louisiana Intrastate Gas Corp., 797 F.2d 238, 243-244 (5th Cir. 1986), an opinion roundly criticized by other courts, concerned a contract dispute involving a general partnership that had partners in both Louisiana and Texas. The Texas partners worked and traveled in Louisiana, as well as communicating with Louisiana frequently; personnel were sent from Texas to Louisiana; and when in Texas the Texas partners received all partnership payments there. 797 F.2d at 243.

(Cont'd)
holding in *Snyder v. Smith* as "law of the case," which indicates Petitioners then viewed the holding of that case as limited to the facts of that case.

There is no conflict between Alabama Supreme Court decisions and the decisions of the United States courts of appeal. Any perceived conflict comes from factual distinctions between the cases cited by Petitioners that address what constitutes "commerce" — which the challenged contemplation test does not address — and this case, where factually the Alabama Supreme Court held that "commerce" was not *involved* in the contract containing the arbitration provision. Certiorari review is unnecessary. The petition is due to be denied.

IV.

THE FEDERAL ARBITRATION ACT WILL NOT BE DESTROYED IF CERTIORARI REVIEW IS DENIED.

With unsupportable assuredness, at pages 16-21, Petitioners predict the complete destruction of the FAA if certiorari is denied and the contemplation test allowed to stand. That argument will not withstand scrutiny.

At pages 17-19, Petitioners claim that certain entire groups of contracts are exempt from the FAA under current Alabama law. For example, at page 17, Petitioners claim that because of this case the FAA and all FAA related decisions "no longer apply in Alabama to all home buyers warranties issued by out of state companies with no local presence."

Petitioners also claim (incorrectly) that the contemplation test, the alleged root of the destruction of the FAA, requires a *purely subjective analysis* of the contemplation of the parties to determine the applicability of the FAA. If that is so, then no entire group of contracts can be judicially removed from the reach of the FAA, because the understanding of the parties to the contract about the interstate activity involved in the contract determines the applicability of the FAA. Cynicism reaches new heights indeed if

Petitioners are actually suggesting that everyone signing contracts containing arbitration provisions would perjure themselves if the issue of subjectively contemplating the arbitration provision was litigated.

In relation to the contemplation test, the only way for there to be a purely uniform result as to an entire group of contracts is if a uniform contract is viewed purely in *objective* terms. That is, if a standard contract was said to be on its four corners outside the FAA and there were no subjective criteria, an entire group of contracts could be held to be outside the FAA. Petitioners strenuously argue that the entire analysis is purely subjective, however. Ms. Lopez has shown that under the purely subjective standard that Petitioners claim exists, there can be no entire group of contracts judicially removed from the FAA.

In reality, the contemplation analysis in the Alabama decisions contains both objective and subjective elements, as shown in Section II.A. With such an analysis, the test effectively prevents widespread destruction of the FAA as to entire groups of contracts. In this regard at the very least, Petitioners should concede that the test is proper.

Considering the logical fallacies of Petitioners' arguments, Ms. Lopez will neither bother the Court with tedious factual discussion of the Alabama cases mentioned, nor will she consume the Court's time replying to the rhetoric based on those fallacies.

CONCLUSION

The apocalyptic tone used throughout by Petitioners is inappropriate. There is nothing unusual or spectacular about this case. The Alabama Supreme Court made a factual determination that the warranty contract containing the arbitration provision did not *involve* interstate "commerce." That judgment and the standard applied in reaching that judgment does not conflict with the decisions of this Court or the United States courts of appeal. Certiorari review is unnecessary.

The petition for a writ of certiorari to the Alabama Supreme Court is due to be denied. The cause is due to be remanded to the Alabama Supreme Court then the Circuit Court of Montgomery County, Alabama, so that Ms. Lopez can proceed to trial.

Respectfully submitted,

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No. 93-995

In The

Supreme Court of the United States

October Term, 1993

HOME BUYERS WARRANTY CORPORATION II, and NATIONAL HOME INSURANCE COMPANY,

Petitioners,

v.

JULIETTE G. LOPEZ,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

REPLY TO BRIEF IN OPPOSITION

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No. 93-995

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HOME BUYERS WARRANTY CORPORATION II, and NATIONAL HOME INSURANCE COMPANY,

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Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

REPLY TO BRIEF IN OPPOSITION

Petitioners file this reply to issues raised in the Brief in Opposition, and to call the Court's attention to still another Alabama Supreme Court decision showing how

that Court has dug in its heels over its restrictive reinterpretation of "involving commerce" under the Federal Arbitration Act (the "FAA").[1]

I. Contrary to respondent's allegations, petitioners focus on the legal interpretation of "involving commerce" under the Federal Arbitration Act

Respondent resorts to two principal devices in an attempt to trivialize the issues raised by this petition.

First, respondent wrongly contends that petitioners focus on the facts of her individual case, rather than upon the broader legal issue raised by the Alabama Supreme Court's impermissibly restrictive reinterpretation of "involving commerce" under the FAA. The truth is that petitioners seek review at a cost many times what the limited Lopez claim is worth precisely because their interest was and is almost exclusively in the jurisdictional reach of the FAA, not only in Alabama but throughout the nation. As the petition shows, petitioner HBWC, from Denver and its several regional offices, services warranties issued in all 48 contiguous states by the 12,000 homebuilder members of its BSSI II affiliate, while petitioner

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[1] The present case has now been officially reported at 628 So.2d 361 (Ala. 1993). Petitions seeking review of two more of the Alabama Supreme Court decisions of last summer applying its restrictive interpretation of "involving Commerce" under the FAA to deny enforcement of pre-dispute arbitration agreements are now pending. They are *The Terminix Int. Co. LP v. Jackson*, and *Allied-Bruce Terminix Cos. v. Dobson*, Nos. 93-1000 and 93-1001.

NHIC insures these thousands upon thousands of warranties. No one claim on any single warranty is materially significant compared to the legal issues raised by the decision below.

Petitioners seek review here solely because it is critically important to them whether the FAA applies uniformly in all states to compel enforceability of the warranties' pre-dispute arbitration clause, and to bring to bear the growing body of federal law this Court has developed around the FAA. Unless this Court intervenes, the arbitration provisions integral to the warranties are simply unenforceable in Alabama. They may also cease to be enforceable in those states (like Nebraska and Mississippi) which share Alabama's hostility to pre-dispute arbitration agreements.[2] And the growing body of federal common law of arbitration developed by this Court since *Prima Paint* may become inapplicable to these and similar agreements in any state which chooses to adopt the restrictive Alabama test. That's why petitioners seek review here.

This case presents a clean vehicle for assessing the Alabama Supreme Court's reinterpretation. Petitioners have no local presence. The warranty in question requires that representatives of the Colorado company inspect the house, with claims to be processed either in Denver or at the regional office in Tucker, Georgia. As was required, respondent sent her claim to the Georgia office, and received responses from Denver. Both the circuit court

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[2] *State v. Nebraska Assn. of Public Employees*, 477 N.W.2d 577 (1991); *McClendon v. Shutt*, 115 So.2d 740 (Miss. 1959).

and the dissenters in the Alabama Supreme Court expressly concluded that the FAA was applicable on these facts, under the broad jurisdictional test which the Alabama Supreme Court had previously endorsed.

Second, respondent tries to confuse and obscure what the Alabama Supreme Court did last summer. To this end, petitioner attempts to shift focus from the restrictive jurisdictional test formally adopted by the Alabama Supreme Court in a sextet of cases (three of which she fails to cite or discuss, and three of which are now before this Court), to an irrelevant quarrel over whether courts are able to use the "contemplation" test to narrow or expand the reach of the FAA.

Here, there is no need to speculate about what the Alabama Supreme Court intended to do or what it did. In the six cases decided last summer, the Alabama Supreme Court majority openly and frankly announced that it was overruling the broad jurisdictional test it had previously applied in the general run of FAA cases in favor of a decidedly more restrictive test – whether the parties "contemplated substantial interstate activity" – previously applied only rarely. And it openly admitted that it was doing so in order better to implement Alabama's public policy hostile to enforcement of pre-dispute arbitration agreements.

The frank language of the majority, the sharp criticisms voiced by the dissenters, and the actual results in the six cases together make clear that, whatever the intent of Congress (and the majority never addressed that issue), it is now abundantly clear that the FAA only

applies in Alabama to fact situations like the one presented in *Continental Grain Co. v. Beasley*, 628 So.2d 319 (Ala. 1993): where an out-of-state business ships huge volumes of materials into Alabama for local processing, then exports most of the finished product to out-of-state designations. Although Congress never intended to so limit the FAA, that is what the FAA has been reduced to in Alabama.

There is now a seventh decision which shows how the Alabama Supreme Court has dug in its heels. Only a few weeks ago, the court decided *Lorance v. Southern Health Corp.*, 1994 Ala. LEXIS 62 (Feb. 11, 1994) (a copy of which is appended hereto). In *Lorance*, it reversed a lower court which held the FAA applicable (even under the Supreme Court's new test) to enforce an arbitration clause in a contract between a Georgia corporation with no Alabama presence and a California physician. The agreement, neither negotiated nor executed in Alabama, required arbitration in Georgia of any dispute arising out of the agreement whereby the Georgia company helped the Californian relocate to Alabama and start a medical practice there, providing "surgical services *mainly* [but not exclusively] to Alabamians." The Alabama Supreme Court compared the facts to those in *Continental Grain*, and found them wanting.[3]

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[3] The court also drew on its recent decision in *First Real Estate Corp. v. Brown Marx Tower LP*, 620 So.2d 648 (Ala. 1993), declining to enforce an arbitration agreement between an Alabama corporation and two New York entities for management of the New Yorker's Alabama properties. Compare *Snyder v. Smith*, 736 F.2d 409, 417-18 (7th Cir. 1984), *cert. denied*, 469 U.S. 1037 (1985), the leading case applying a broad interpretation of

II. Respondent misstates the relevance of this Court's decision in *Perry v. Thomas*

Petitioners do not contend, as respondent suggests, that *Perry v. Thomas*, 482 U.S. 483 (1987), directly addressed the jurisdictional question raised here. Rather, petitioners point out that the Court's widely quoted description of the FAA, 482 U.S., at 490, as

> a statute that embodies Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause

was not casually uttered, and was indeed essential to the decision. *Perry* held that the FAA preempted provisions of the California Labor Code which exempted wage claims from arbitration. Difficulty arose from the fact that the Court had previously held the same anti-arbitration provisions not preempted under the federal securities laws and New York Stock Exchange rules requiring arbitration of disputes between a broker and his employer. The key question, then, was how the FAA differed from the federal securities laws. The Court found that the securities laws lacked any specific intent to prefer arbitration over other modes of resolving employment disputes, did not require nationwide uniformity of exchange housekeeping affairs, and addressed only a specific industry. The Court compared that scheme to the FAA – whose very first feature, said the Court, was that it

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"involving commerce" to compel arbitration of a dispute over the price to be paid for a deceased partner's interest in out-of-state property.

embodied Congress' intent to enforce arbitration agreements to the fullest extent of the Commerce Clause.

In short, although the Court addressed a preemption rather than jurisdiction issue, its decision rested squarely upon the conclusion that the FAA was intended to apply "within the full reach of the Commerce Clause." One can fairly view *Perry v. Thomas* as the linchpin of the body of law developed around the FAA by this Court since *Prima Paint*. For at page 489 it reiterated the teaching of *Moses H. Cone Mem. Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24, that:

> Section 2 is a Congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.

And it set that teaching in its proper jurisdictional context – namely, that the policy was to apply to all voluntary agreements choosing arbitration that Congress was able to reach under the Commerce Clause.

III. Respondent seriously understates the significance of the decision below

The decision below and its companion decisions have already had the immediate intended effect in Alabama. For all practical purposes, pre-dispute arbitration agreements voluntarily entered into are no longer enforceable in Alabama unless the facts are comparable to those in *Continental Grain*. The FAA has thus been amended no longer to apply to any dispute between an Alabama consumer and an out-of-state company. Indeed, under the new *Lorance* decision, it no longer applies to out-of-

staters inducing another out-of-stater to move his business to Alabama – so long as the agreement involves commercial conduct to be performed in Alabama, or commercial services to be provided "mainly to Alabamians." In short, Alabama has opted out of what *Perry v. Thomas* found was intended to be a uniform national scheme favoring arbitration in all matters within the full reach of the Commerce Clause.

But that does not exhaust the significance of the Alabama Supreme Court's reinterpretation of "involving commerce." A landmark article by arbitration authority Henry Strickland points out that in many states the meaning, for FAA purposes, of "involving commerce" has not yet been addressed or clearly resolved.[4] Moreover, he notes that a great many states have important substantive and procedural rules more hostile to arbitration than the body of federal law developed under the FAA. According to Professor Strickland's well-documented catalogue (set out at pages 400-409), even in states whose laws generally require enforcement of pre-dispute arbitration agreements, certain kinds of disputes (e.g., tort, insurance,

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[4] Strickland, "The Federal Arbitration Act's Interstate Commerce Requirement: What's Left for State Arbitration Law?," 21 *Hofstra L. Rev.* 385 (1991). After reviewing the jurisdictional decisions, the author concludes that "As the foregoing survey demonstrates, case law on the FAA's commerce requirement is ambiguous and erratic." *Id., at 454.* He also points out that this continuing uncertainty as to FAA jurisdiction itself invites and breeds threshold litigation, which – like the Alabama Supreme Court's reliance on a subjective "contemplation" test – defeats the FAA's objective of making arbitration speedy and uncomplicated. *Id., at 455-56.*

medical malpractice claims) are often consigned exclusively to the courts. Arbitration clauses are sometimes excluded from specific kinds of agreements – e.g., consumer financing transactions and loan agreements. And special validity pre-conditions are frequently imposed only on arbitration agreements, and on no other kinds of contracts – such as requiring signatures of both the party and his or her lawyer, or that the arbitration clause be separately initialed. Many of these restrictions are the progeny of precisely the residual suspicion and hostility toward arbitration that the FAA was intended to overrule.

Narrowing the reach of the FAA to apply only to transactions in which the parties "contemplated substantial interstate activity" in most cases insulates such hostile rules from the force of the federal statute. Many a state will be tempted to protect some such rule by adopting the Alabama approach.

It is important that this Court take this opportunity to declare that it meant what it said in *Perry v. Thomas*, and that as to arbitration agreements entered into voluntarily by the parties, the pro-arbitration policy reflected in the FAA applies to the full reach of the Commerce Clause.

CONCLUSION

For the reasons stated in this reply and in their original petition, the Court should grant the writ and review the decision below.

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March 9, 1994

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1993-94

1930140

Ex Parte Thomas A. Lorance, M.D.
PETITION FOR WRIT OF MANDAMUS

(Re: Thomas A. Lorance, M.D.

v.

Southern Health Corporation of Hamilton, Inc., et al.)

(Marion Circuit Court, CV-93-57)

PER CURIAM.

The plaintiff, Thomas A. Lorance, M.D., petitions this Court for a writ of mandamus directing Judge Bobby R. Aderholt of the Marion County Circuit Court to set aside an order compelling arbitration of tort and breach-of-contract claims brought by Lorance against Southern Health Corporation of Hamilton, Inc. ("Southern Health"); Niles V. Floyd, vice president of Southern Health; and Frank Jenkins, M.D.[1] The issue is whether the arbitration clause in the professional services contract entered into by Lorance and Southern Health is enforceable under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA").

Predispute arbitration agreements are unenforceable under Alabama law, § 8-1-41, Alabama Code 1975; *Wells*

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[1] Jenkins is apparently an officer of Southern Health, although the petition does not indicate his title.

v. Mobile County Bd. of Realtors, Inc., 387 So. 2d 140 (Ala. 1980); however, if an arbitration clause is contained in a contract that involves interstate commerce, then the FAA preempts state law, and the clause is enforceable. *Ex parte Alabama Oxygen Co.*, 433 So. 2d 1158, *vacated, York Int'l v. Alabama Oxygen Co.*, 465 U. S. 1016, 104 S. Ct. 1260, 79 L. Ed. 2d 668 (1983); *Terminix Int'l Co. Ltd. Partnership v. Jackson*, [Ms. 1911842, August 13, 1993] ___ So. 2d ___ (Ala. 1993). The FAA makes certain arbitration clauses enforceable:

> "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable."

9 U.S.C. § 2. " 'The FAA applies to a transaction within this state if the contract [1] involves interstate commerce and [2] contains an arbitration clause voluntarily entered into by the parties.' " *Lopez v. Home Buyers Warranty Corp.*, [Ms. 1920330, August 20, 1993] ___ So. 2d ___ (Ala. 1993) (quoting *A. J. Taft Coal Co. v. Randolph*, 602 So. 2d 395, 397 (Ala. 1992)). The test of whether a contract containing an arbitration clause involves interstate commerce is whether the parties to the contract contemplated substantial interstate activity at the time they entered into the contract. *Ex parte Jones*, [Ms. 1920249, July 16, 1993] ___ So. 2d ___ (Ala. 1993).

In March 1992, Lorance and Southern Health entered into a "Net Income Guarantee Agreement," under which

Lorance agreed to establish a medical practice in Hamilton, Alabama, in exchange for Southern Health's promise to help Lorance establish his practice and to subsidize his net practice income during the term of the contract by paying him $15,000 per month. This contract contained an arbitration clause, which required that all claims or controversies arising out of or relating to the contract be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association and that the arbitration be conducted in Atlanta, Georgia.

Southern Health is a Georgia corporation with its corporate offices in Atlanta, Georgia. Southern Health's officers, G. Frank Jenkins, M.D., president; Phillip H. Eastman III, vice president/secretary; Mike Hall, executive vice president; and Susan Jennings negotiated that Net Income Guaranty Agreement from Southern Health's corporate offices in Atlanta, Georgia; Lorance at that time was residing in California. According to the affidavits of Jenkins and Eastman, the final act making the contract enforceable was Eastman's execution of the contract in Atlanta.

In its written order, the circuit court held that Lorance and Southern Health contemplated substantial interstate activity in the performance of the contract, noting that when the contract was negotiated, Lorance was a California resident and Southern Health was a Georgia corporation; that the negotiations took place, and the contract was executed, outside Alabama; that the income guarantee payments to Lorance by Southern Health originated in Atlanta, Georgia; and that Lorance and agents of Southern Health communicated numerous

times concerning the establishment of Lorance's practice, e.g., they communicated in regard to marketing, medical equipment, and supplies.

Citing *First Real Estate Corp. v. Brown Marx Tower Limited Partnership*, 620 So. 2d 648 (Ala. 1993), Lorance argues that the circuit court erred in compelling arbitration and that, notwithstanding the communications between the parties across state lines during the negotiation of the contract, the purpose or "focus" of the contract was to subsidize and assist Lorance in establishing a medical, surgical practice in Hamilton, Alabama. Therefore, Lorance contends, the activity that the parties contemplated was purely local.

Citing *Continental Grain Co. v. Beasley*, [Ms. 1920241, July 16, 1993] ___ So. 2d ___ (Ala. 1993), Southern Health, Jenkins, and Floyd counter, arguing that it is the scope of the contract, not the *locus actus* – place of performance – that determines the applicability of the FAA. Therefore, they say that, because the contract was negotiated while neither party to the contract was a resident of Alabama and because Southern Health's performance under the contract was directed from its corporate offices in Atlanta, Georgia, the contract involved substantial interstate activity.

In *First Real Estate Corp., supra*, the issue was whether a commercial real estate management agreement involved interstate commerce for purposes of applying the FAA. First Real Estate Corporation of Alabama, Inc., an Alabama corporation, entered into separate management agreements with Brown Marx Tower Limited Partnership (a limited partnership organized under the laws of New

York) and Bell Building Group, Inc. (an Alabama corporation with its principal place of business in New York), for the management of Brown Marx Tower in Birmingham, Alabama, and the Bell Building in Montgomery, Alabama. Under these management agreements, which were negotiated in Alabama, First Real Estate was to manage the Brown Marx Tower and the Bell Building. Brown Marx Tower Limited Partnership and the Bell Building Group brought an action against First Real Estate, alleging fraud, breach of contract, breach of fiduciary duty, gross negligence, and tortious interference with business relations. All of these allegations concerned actions or events that occurred in Alabama and that arose from obligations that were to be performed solely in Alabama. Holding that the management agreements did not involve interstate commerce, the Court stated that the "mere use of the telephone and mail by persons in different states to communicate about activity that is purely local is too slight to constitute such a nexus." 620 So. 2d at 649.

Although the contract in this case was not negotiated in Alabama, the holding in *First Real Estate Corp.* persuades us that the communications between the parties during both the negotiation of the contract and its performance concerned an activity that the purely local, namely, the establishment of a surgical practice in Hamilton, Alabama. We hold, therefore, that these communications do not, by themselves, support an inference that the parties contemplated substantial interstate activity when they entered into the "Net Income Guarantee Agreement." Like the service contracts in *First Real Estate Corp.*, which were entered into by companies either organized or having their principal place of business in

another state, for the management of commercial real estate located in Birmingham and Montgomery, Alabama, the professional service agreement in this case was entered into for the purpose of establishing a surgical practice in Hamilton, Alabama. Although the parties to the agreements in *First Real Estate Corp.* and the parties to the agreement in this case engaged in communications across state lines, the activity toward which their contracts and their efforts were directed was purely local.

Southern Health contends that the parties contemplated substantial interstate activity and that this contention is supported by evidence indicating that Southern Health's agents, working in Atlanta, Georgia, directed that corporation's performance under the contract. We conclude that *Continental Grain Co. v. Beasley, supra,* does not support Southern Health's argument. *Continental Grain Co.* involved an arbitration agreement between Continental Grain Company (a poultry products retailer) and a group of Alabama chicken growers. Although the growers' performance under the contract consisted solely of growing chickens in Alabama during the period between hatching and processing, the Court held that the parties had contemplated substantial interstate activity in performing their contractual obligations because they were engaged in the production of poultry, 90 percent of which was to be sold out of state in interstate commerce.

Southern Health relies heavily on this Court's statement in *Continental Grain Co.* that the place of performance under the contract is not dispositive and that it is the "scope of the contract," and not the *locus actus,* that determines the applicability of the FAA. The Court in *Continental Grain Co.* made it clear that although the

growers' performance under the contract occurred solely in Alabama, their performance under the contract was but one part of a larger production process that contemplated the ultimate sale of 90 percent of the poultry in interstate commerce. Therefore, the *Continental Grain Co.* Court concluded, the scope of the contract encompassed substantial interstate activity. In this case, however, although some of Southern Health's performance under the contract was directed by its agents from Atlanta, Georgia, the scope of the Net Income Guarantee Agreement was not so extensive as to include substantial interstate activity. The scope of the contract consisted principally of establishing a medical practice in Hamilton, Alabama, to provide surgical services mainly to Alabamians in Marion County.

Based on the foregoing, we hold that the circuit court erred in compelling arbitration of Lorance's claims against Southern Health under the Net Income Guaranty Agreement. Therefore, the petitioner is entitled to the writ.

WRIT GRANTED.

Hornsby, C. J., and Almon, Shores, Steagall, Kennedy, Ingram, and Cook, JJ., concur.

Houston, J., dissents.

Ex parte Thomas A. Lorance, M.D.

HOUSTON, JUSTICE (dissenting).

I would deny the writ. *Continental Grain Co. v. Beasley,* [Ms. 1920241, July 16, 1993] ___ So.2d ___ (Ala. 1993).